

**CERTIFIED FOR PARTIAL PUBLICATION**\*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARGARITO A. IBOA,

Defendant and Appellant.

B230342

(Los Angeles County  
Super. Ct. No. MA048127)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Carla Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts I (A) and (C), IV, V, VI, and VII.

## INTRODUCTION

Defendant and appellant Margarito A. Iboa told firefighters and deputies trying to put out a fire in his backyard to, among other things, “get the fuck” off his property. He combined his belligerent words with aggressive conduct, albeit stopping short of threatening to “kill” the officers and of physical violence. Iboa was charged and convicted, under Penal Code section 69,<sup>1</sup> of seven counts of deterring or preventing, by means of any threat or violence, an executive officer from performing a duty imposed by law.

Iboa contends on appeal that his convictions on those counts must be reversed because the First Amendment protected his speech and because the jury was not instructed his threat must have been “a serious expression of intention to inflict bodily harm.” In the published portion of this opinion, we find that where, as here, there is sufficient evidence a defendant combined threatening language with threatening physical behavior, he may be convicted, under section 69, of threatening unlawful violence without running afoul of the First Amendment. We also conclude that the trial court did not err by failing to instruct the jury that a threat under section 69 must be “a serious expression of intention to inflict bodily harm,” because that is not an element of the crime.

Although we conclude that there is no ground to reverse Iboa’s convictions under section 69, we find, in the unpublished portion of this opinion, that there is insufficient evidence to support the jury’s true findings on the gang allegations as to five of the seven counts. We also find that Iboa’s convictions on three counts of felony child endangerment must be reduced to misdemeanors. We reject the remaining contentions and reverse and remand this matter for resentencing.

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Factual background.

(A) *December 28, 2009: Iboa refuses to submit to a lawful detention (count 12).*

On December 28, 2009, at 8:30 a.m., Lancaster Deputy Sheriff Diego Andrade (Deputy Andrade) went to Iboa's house on Gadsden Avenue in Lancaster because someone complained about loud music. When the deputy, in uniform, arrived, Iboa was standing by a car from which loud music was coming. Using a fast pace, Iboa angrily walked toward the deputy. Concerned that Iboa might have a weapon concealed in his baggy clothing, the deputy told Iboa to put his hands on the hood of the patrol car. Saying, " 'Fuck you. Stop harassing me,' " Iboa instead ran to the front yard area of the house. When the deputy explained why he was there, Iboa turned off the music, although he again refused to walk to the deputy, repeating, " 'Fuck you. I'm not doin' shit.' "

Deputy Andrade called for backup, while Iboa continued to yell that the deputy needed a warrant. When Sergeant Roelofson arrived, Iboa cursed at him too. Iboa ran into the house, and the deputies left.

(B) *January 26, 2010: Iboa attempts by threats to deter executive officers from performing their duties (counts 1-7).*

On January 26, 2010, at 2:00 a.m., about 12 firefighters (including Michael Peterson, Joseph Carvalho, Jason Swan, Christopher Brown, and Fire Captain Jim De'Evelyn), went to Iboa's house after receiving reports of a fire. A 10- to 12-foot pile of debris was on fire in Iboa's backyard, and 10-foot flames could be seen from the street. Asleep, Iboa was off to the side of the fire. Firefighter Carvalho woke Iboa, who grabbed a hose to help put out the fire.

When Fire Captain De'Evelyn tried to talk to Iboa about the fire, an argument erupted. Concerned that Iboa was going to assault the captain, because Iboa "was kind of puffed-chest" and cussing, Firefighter Carvalho stepped between De'Evelyn and Iboa. Firefighter Brown also thought that Iboa approached the captain aggressively, with "just maybe kind of a little physical threat, kind of a little body force." Iboa turned to go back

to the house, and Carvalho, thinking that Iboa was getting a gun or knife, told the other firefighters to leave, even though they weren't done putting out the fire. When Iboa ran past Firefighter Swan, he heard Iboa say, “ ‘I'll take care of you guys’ ” or “ ‘You'll see what happens.’ ” Firefighter Brown thought Iboa said something like, “ ‘I'm going to show you’ ” or “ ‘We'll see about that.’ ”

Iboa came out of the backyard and threw out the fire hose. He yelled at the firefighters to “get the fuck off his property” and asked “who the fuck [they] thought [they] were.” He said they didn't know “who the fuck” he was, and he would “show [them] who” he was. The fire chief instructed the firefighters to wait for sheriffs to arrive.

Los Angeles County Deputy Sheriffs Ryan Valento (Deputy Valento) and Gabriel Frias (Deputy Frias) soon arrived at the house, where the fire was still burning. Deputy Frias asked Iboa to talk to him, but Iboa said, “ ‘Fuck you guys. You need a warrant. I can burn whatever I want.’ ” Iboa lifted his shirt, exposing his Mid Town Criminals (MTC) gang tattoos, and yelled that they couldn't come in without a warrant, that “ ‘You can't fuck with me. I'm from fuckin' M-T-C,’ ” which was tattooed on his stomach. Deputy Valento thought that Iboa, whose fists were clenched, wanted to fight. Yelling, Iboa, while lifting his shirt and acting wild, walked back and forth towards the deputies until he was 8 to 10 feet from them. Deputy Valento judged it unsafe to go onto Iboa's property to take care of the fire until more deputies arrived.

When more deputies arrived, they jumped over the fence, and Iboa ran into the house. With their guns out, the deputies told the firefighters to put out the fire, which they quickly did. Iboa did not come back outside.

(C) *January 27, 2010: The search of Iboa's home (counts 8-10).*

The next day, January 27, 2010, Detectives Steve Owen and Mark Donnel from the Los Angeles County Sheriff's Department searched Iboa's house. At the time of the search, Iboa, Roberta Garcia, Anthony Martinez, and three children—aged six, three and one—were in the house. Garcia was the children's mother, and Iboa was the father of the two youngest children and the stepfather of the oldest child. Inside, the house was filthy,

with trash and debris lying about. Wires were exposed, and Detective Owen was almost shocked by a spark of electricity when he flipped a switch in the kitchen. A marijuana bong was in the front room on the fireplace mantle. The front security door had two bullet holes in it. Old food was all over the kitchen, which smelled like old trash. Old food and mold were also inside the refrigerator. There was no running water in the house, and the sole toilet was filled with urine and feces. The house was unheated, and it was just as cold in the house as it was outside, in the low 30's. The youngest child was on a bed but the two oldest children were on the floor with blankets. The children's feet were dirty, and the youngest had a runny nose. On the floor in the room in which the children were found was an open 40-ounce beer bottle.

Martinez, who was in the house at the time of the search, was a member of the Park 13 gang, but he hung out with MTC gang members in Lancaster. In his pocket, he had a blade that was in an open, locked position.

The detectives found a calendar on which the birthdates of people with gang monikers were marked; photographs with people making MTC gang signs; and papers with the phone numbers and addresses of gang members. A cell phone found in the bedroom had MTC gang monikers programmed into the contact list.

On January 26, 2010, this text was received on the cell phone, " 'Hey, can you gt a 20 sac 4 me? I'm leaving wrk nw.' " No drugs or drug paraphernalia or pay-owe sheets, however, were found in the house. But in the trunk of a car parked in the driveway, detectives found a gram scale and a Ziploc baggie containing additional baggies. Three baggies containing methamphetamine were in the driver's side sun visor. The three baggies had a net weight of about .52 grams of powder having a street value of \$50 to \$100. A criminalist analyzed two of the three baggies, and the two baggies contained .35 grams of methamphetamine. In Detective Gillis's opinion, the methamphetamine was possessed for the purpose of selling it.

In a detached garage, detectives found 16 live rounds of ammunition of varying calibers and five expired rounds. Two sword-type knives were in the garage. No

firearms were found in the garage or the house, but a semi-automatic handgun magazine holder was under the mattress in Iboa's room.

(D) *Gang evidence.*

Detective Richard Cartmill at Lancaster Sheriff's Station was assigned to the gang unit in Antelope Valley. He was familiar with the MTC gang in Antelope Valley and had testified approximately 10 times as an expert on the gang, which had about 120 documented members. MTC engaged "in crimes such as assaults, up to and including attempted murder, weapons possession, possession for sales of drugs, vandalism, [and] robbery." It was known for selling methamphetamine.

Iboa ("Cruiser") had been MTC's leader for close to a decade. His home on Gadsen was a well known MTC house. He had MTC tattooed on his stomach, " 'Mid Town Criminals' " tattooed on his neck, a teardrop tattoo on his face, and " 'Heffe de Heffe' " on his arm.

According to Detective Cartmill, a gang member displays and references his gang tattoos to law enforcement to intimidate law enforcement and the general public and to enhance the gang's reputation.

## **II. Procedural background.**

On October 22, 2010, a jury found Iboa guilty of counts 1 to 7, attempting by threat or violence to deter an executive officer from performing his or her duty (§ 69);<sup>2</sup> counts 8 to 10, felony child endangerment (§ 273a, subd. (a)); count 11, possession of methamphetamine for sale (Health & Saf. Code, § 11378); and count 12, resisting, obstructing or delaying a peace officer (§ 148, subd. (a)(1)). As to counts 1 to 7 and 11, the jury found true gang allegations under section 186.22, subdivision (b)(1)(A). As to count 12, the jury found true a gang allegation under section 186.22, subdivision (d).

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<sup>2</sup> Counts 1 to 5 concerned Firefighter Peterson, Paramedic Swan, Fire Engineer Brown, Captain De'Evelyn, and Paramedic Carvalho; and counts 6 and 7 concerned Deputies Frias and Valento.

On January 18, 2011, the trial court sentenced Iboa to the midterm of two years on count 1 plus three years on the gang enhancement, to one year four months on count 8, to one year eight months on count 11, and to eight months on count 12, for a total of eight years eight months in prison. The court imposed concurrent sentences on the remaining counts.<sup>3</sup>

## DISCUSSION

### III. Counts 1 to 7, preventing an executive officer from performing an official duty under section 69.

#### (A) *Sufficiency of the evidence.*

Iboa contends that his convictions under section 69 violate his First Amendment right to free speech because there was insufficient evidence anything he said was a “serious expression of an intention to commit an act which would result in bodily harm” to the firefighters and deputies. We disagree.

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ‘ “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests

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<sup>3</sup> The court imposed concurrent two-year sentences on counts 2 through 7, plus three years based on the gang enhancement on each of the counts. The court imposed concurrent four-year sentences on counts 9 and 10.

guilt and the other innocence [citations], it is the jury, not the appellate court[,], which must be convinced of the defendant's guilt beyond a reasonable doubt. "If the circumstances reasonably justify the trier of fact's findings, . . . that . . . does not warrant a reversal of the judgment." ' [Citations.]' ' [Citation.]' (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

Section 69 provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty" shall be punished by a fine or imprisonment. (See also *In re Manuel G.* (1997) 16 Cal.4th 805, 814.) The section prohibits two distinct types of activity—"threats and violent conduct—when *either* activity constitutes an attempt 'to deter or prevent an executive officer from performing any duty imposed upon such officer by law.' " (*People v. Hines* (1997) 15 Cal.4th 997, 1061-1062 (*Hines*); see also *In re Manuel G.*, at p. 814.)

Where, as here, physical violence does not accompany the threat, we must be mindful of the risk of punishing First Amendment speech. The First Amendment protects expression that engages, in some fashion, public dialogue. (*In re M.S.* (1995) 10 Cal.4th 698, 710.) But where speech strays from "the values of persuasion, dialogue and free exchange of ideas, and moves toward willful threats to perform illegal acts, the state has greater latitude to regulate expression." (*Ibid.*) The state may thus punish threats falling outside the purview of the First Amendment, even if the threat is pure speech. (*Ibid.*; *Virginia v. Black* (2003) 538 U.S. 343, 359 [a "'true threat' " encompasses "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" to an individual or group].) To avoid the risk of punishing protected First Amendment speech, the "threat" section 69 refers to is therefore a threat of unlawful violence in an attempt to deter the officer. (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 815 ["The central requirement of the first type of offense under section 69 is an attempt to deter an executive officer from performing his or her duties imposed by law; unlawful violence, or a threat of unlawful violence, is merely the means by which

the attempt is made”]; *People v. Superior Court (Anderson)* (1984) 151 Cal.App.3d 893, 895-898 (*Anderson*).)

Although section 69 prohibits a threat of “unlawful violence,” Iboa argues that section 69 instead requires a showing his threat was a “ ‘serious expression of intention to inflict bodily harm.’ ” (*Hines, supra*, 15 Cal.4th at p. 1061.) Iboa bases this argument on *Hines*, which rejected a custodial defendant’s argument that section 69 was unconstitutionally overbroad because he did not have the immediate ability to carry out his threat to kill prison guards. *Hines* said: “ ‘As long as the threat reasonably appears to be a serious expression of intention to inflict bodily harm [citation] and its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out ’ ” (15 Cal.4th at p. 1061, citing *In re M.S., supra*, 10 Cal.4th at p. 714), “the fact the threat may be contingent on some future event . . . does not cloak it in constitutional protection” (*In re M.S.*, at p. 714). *Hines* concerned constitutional challenges to statutes proscribing threats and concluded that such a statute, like section 69, will not run afoul of the First Amendment because it lacks an immediacy element. (*Hines*, at p. 1061.) In other words, threats may be prohibited even when there is no immediate danger they will be carried out, and section 69 “ ‘is not unconstitutional for lacking a requirement of immediacy or imminence.’ [Citation.]” (*Hines*, at p. 1061.)

*Hines*’s observation that the threat must be a serious expression of intention to inflict bodily harm was therefore made in the context of rejecting a constitutional challenge to section 69 on overbreadth grounds. This is apparent when the entire *Hines* quote is cited and not the truncated one Iboa uses; specifically, Iboa notes that *Hines* said the threat must reasonably appear to be a “ ‘serious expression of intention to inflict bodily harm.’ ” He ignores that the court went on to say that the threat’s “ ‘circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out.’ ” (*Hines, supra*, 15 Cal.4th at p. 1061.) The omitted language confirms that the court was addressing only the constitutional argument and refuting the notion that the consequence threatened must be immediately forthcoming. The court did

not either discuss the elements of the crime under section 69 or otherwise suggest that a “ ‘serious expression of intention to inflict bodily harm’ ” is an element of the crime.

Rather, to sustain Iboa’s conviction under section 69, there must be sufficient evidence he threatened unlawful violence. (*Anderson, supra*, 151 Cal.App.3d at pp. 895-898.) It is true that Iboa did not utter the word “kill” or directly and unambiguously threaten to inflict bodily harm on the firefighters or the deputies. (Cf. *In re Manuel G., supra*, 16 Cal.4th at p. 811 [“ ‘Me and my home boys are going to start killing you and your friends’ ”; “ ‘Hey, you better be watching your back. And we’re going to start knocking you guys off. You guys aren’t so bad. I’m not afraid of dying. You guys are the ones that should be afraid of dying’ ” (*ibid.*); “ ‘I’m tired of you guys fucking with us, and you better watch out, we’re going to start knocking you guys off’ ” (*id.* at p. 812)]; *Hines, supra*, 15 Cal.4th at p. 1060 [the defendant said Deputy Warren “ ‘would be sorry [he] ever saw’ defendant”; he would throw bars of soap at Warren (*id.* at p. 1059); “ ‘I am going to kill you. This is a threat. You’re dead’ ” (*ibid.*); “ ‘Stop going through my stuff or I will kick you in the face’ ” (*ibid.*)]; *Anderson*, at p. 893 [the defendant wrote a letter to the mayor threatening to kill her if she didn’t resign].) Although these cases involve an unequivocal threat to “kill” the executive officer, threats must be placed and understood in their context, otherwise the line between, for example, heated but protected political hyperbole and an unprotected threat of unlawful violence will not easily be drawn. (See, e.g., *Anderson*, at p. 896; *Watts v. United States* (1969) 394 U.S. 705 [taken in the context of a political rally, a threat to shoot the president was political hyperbole]; *Beck v. City of Upland* (9th Cir. 2008) 527 F.3d 853, 858 [placed in the context of a heated discussion over zoning violations, Beck’s statement that the officer “ ‘[didn’t] know who [he was] dealing with’ ” could not have been understood to threaten violence].)

Iboa’s words were not mere “political hyperbole.” They were threats of unlawful violence. Iboa swore at the firefighters to “get the fuck off his property,” asked “who the fuck [they] thought [they] were,” told them they didn’t know “who the fuck” he was, and he would “show [them] who” he was. Violently, he threw the fire hose out of his

backyard. Heatedly, he argued with Captain De'Evelyn, causing other firefighters to become concerned that Iboa, who "was kind of puffed-chest," cussing and aggressive, would assault the captain. Believing that violence was imminent, Firefighter Carvalho stepped between Captain De'Evelyn and Iboa. Then, when Iboa started back to the house, firefighters heard Iboa say something to the effect of, " 'I'll take care of you guys' " or " 'You'll see what happens' " or " 'I'm going to show you' " or " 'We'll see about that.' " Believing that Iboa was getting a weapon, the firefighters left Iboa's property, even though the fire hadn't been completely extinguished.

When Deputies Valento and Frias arrived, Iboa continued to behave belligerently, saying, " 'Fuck you guys. You need a warrant. I can burn whatever I want.' " While such harsh words alone might not constitute a threat of unlawful violence,<sup>4</sup> Iboa then underscored his words with action: he lifted his shirt to expose gang tattoos. He told the deputies they couldn't " 'fuck' " with him because he was " 'from fuckin' MTC.' " During this time, Iboa's fists were clenched and he paced back and forth towards the deputies, causing the deputies to wait for backup before venturing onto Iboa's property.

Iboa's threatening statements, combined with his physical conduct of pacing, clenching his fists, showing off his gang tattoos, and aggressively approaching Captain De'Evelyn, constituted the type of threat of unlawful violence section 69 prohibits. His conduct gave context to his threatening speech, which was intended to and did deter the firefighters and deputies from performing their official duties.

(B) *Instructional error.*

Based on his misreading of *Hines*, Iboa also contends that the trial court, sua sponte, should have been instructed that his threat had to be a "serious expression of

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<sup>4</sup> See *Houston v. Hill* (1987) 482 U.S. 451, 461, quoting *Terminiello v. Chicago* (1949) 337 U.S. 1, 4 ["[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. 'Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest' "].

intention to inflict bodily harm.”<sup>5</sup> A trial court, however, must instruct the jury, sua sponte, on the general principles of law that are closely and openly connected to the facts and that are necessary for the jury’s understanding of the case. (*People v. Moya* (2009) 47 Cal.4th 537, 548; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) But if “the original instructions are themselves full and complete,” whether additional explanation is required “to satisfy the jury’s request for information” is a matter left to the trial court’s discretion. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1213, superseded by statute on another ground as stated in *In re Steele* (2004) 32 Cal.4th 682.) When an instruction is potentially ambiguous or misleading, the instruction is not reversible error unless there is a reasonable likelihood that the jurors misunderstood or misapplied the pertinent instruction. (*Ibid.*; *People v. Avena* (1996) 13 Cal.4th 394, 416-417.)

As we have said, the full, not truncated, quote from *Hines* is the threat must reasonably appear to be a “ ‘serious expression of intention to inflict bodily harm’ ” and “ ‘its circumstances are such that there is a reasonable tendency to produce in the victim a fear that the threat will be carried out.’ ” (*Hines, supra*, 15 Cal.4th at p. 1061.) Although Iboa argues that the jury should have been instructed with the first part of the quote, he gives no explanation why the second part of it should be ignored. To instruct the jury with either the partial or full quote would, in any event, potentially confuse the jury by suggesting a requirement that the victim in fact believed that the threat would be carried out. The victim, however, need not believe there is an immediate danger the threat will be carried out. (*Ibid.*) The trial court therefore properly did not instruct the jury with Iboa’s proposed language from *Hines*.

The jury was instead properly instructed: “Every person who willfully [and unlawfully] attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon that officer by law, or who knowingly resists, by the use of force or violence, an executive officer in the performance of his or

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<sup>5</sup> Iboa did not request a jury instruction, and therefore the issue arguably has been forfeited. We will nonetheless address the issue to preclude the ineffective assistance of counsel claim.

her duty, is guilty of a violation of Penal Code section 69, a crime. . . . [¶] . . . [¶] In order to prove this crime, each of the following elements must be proved: [¶] [1.] A person willfully [and unlawfully] attempted to deter or prevent an executive officer from performing . . . any duty imposed upon that officer by law; and [¶] [2.] The attempt was accomplished by means of any threat or violence.” (CALJIC No. 7.50.)

This informed the jury that the attempt to deter the executive officer from performing an official duty had to be accomplished by “*threat or violence*.” This language strongly suggests that the threat must rise to a level of unlawful violence.<sup>6</sup> This is especially clear when considered in the context of the prosecutor’s argument. The prosecutor told the jury: “It’s important to understand that those [section] 69 charges are not assaults on executive officers. . . . [¶] It’s the threatening, violent behavior that causes an executive officer not to be able to perform the duty . . . .” He also argued: “And violence, again, isn’t contact. Violence is behavior. The threat is the behavior. ‘I’m MTC, motherfucker. Get off my block.’ [¶] That’s the threat.”

Defense counsel similarly argued that the jury had to decide whether Iboa’s threats were threats of violence: “Violence and a threat can be verbal, threaten to shoot someone. I’m going to shoot you. I’m going to punch you. Those are obviously threats. [¶] Now, violence can also be interpreted based on the circumstances. You can look at someone’s conduct and words and judge whether or not it’s violent. [¶] For instance, if you say—if you’re acting crazy, you’re acting belligerent, you say, ‘I’ll show you. You point your hand out like a gun gesture.’ Verbally you’re not threatening them, but that could be interpreted as a threat. That makes sense. [¶] But when you say, ‘Oh. I’ll show you,’ if you’re just yelling, you know, acting crazy and belligerent, that doesn’t rise to the level of violence. [¶] Yeah, he’s acting stupid, he’s being a jerk, but that isn’t necessarily violence.”

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<sup>6</sup> Iboa does not argue that the jury should have been instructed that the threat must be one of “unlawful violence” (*In re Manuel G.*, *supra*, 16 Cal.4th at pp. 814-815), and we do not address that issue.

The prosecutor and defense counsel thus clearly conveyed to the jury that the “threat” section 69 prohibits is one of violence. There was no suggestion that a threat unrelated to unlawful violence would violate section 69.<sup>7</sup>

#### **IV. Counts 8 to 10, felony child endangerment.**

The jury found Iboa guilty of counts 8 to 10, felony child endangerment. He contends on appeal that there was insufficient evidence to support felony child endangerment and that the judgment on those counts should be reduced to misdemeanor child endangerment.<sup>8</sup> We agree.

Section 273a, subdivision (a), provides that felony child endangerment occurs when “[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, . . . having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered . . . .” (See also *People v. Toney* (1999) 76 Cal.App.4th 618, 621-622.) But where a person engages in the same conduct under circumstances or conditions other than those likely to produce great bodily injury, it is misdemeanor child endangerment under section 273a, subdivision (b).<sup>9</sup> (*People v. Burton* (2006) 143 Cal.App.4th 447, 454, fn. 4.)

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<sup>7</sup> Iboa also argues that his counsel provided ineffective assistance, because he did not ask that CALJIC No. 7.50 be modified. (See generally, *People v. Holt* (1997) 15 Cal.4th 619, 703; *People v. Carter* (2003) 30 Cal.4th 1166, 1211; *Strickland v. Washington* (1984) 466 U.S. 668, 694.) Because we have found that the trial court had no sua sponte duty to instruct the jury that a violation of section 69 requires a showing of a serious expression of an intention to commit an act which would result in bodily harm, Iboa’s ineffective assistance of counsel claim fails.

<sup>8</sup> We stated above the sufficiency of the evidence standard of review.

<sup>9</sup> Subdivision (b) of section 273a provides: “Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured or willfully causes or permits that child to

Thus, the difference between felony and misdemeanor child endangerment is the felony requires evidence the defendant placed the child in circumstances “likely” to produce great bodily injury or death. There is, however, ambiguity in what the word “likely” in the phrase, “likely to produce great bodily harm or death” means. One Court of Appeal held that “likely” refers to a “substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death.” (*People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204.) But *People v. Sargent* (1999) 19 Cal.4th 1206, 1223, suggests that “likely” means “under conditions ‘in which the probability of serious injury is great.’ ” We need not decide which is correct, because under either formulation, Iboa’s conduct did not rise to the level of a felony.

Section 273a “encompasses a wide variety of situations and includes both direct and indirect conduct.” (*People v. Burton, supra*, 143 Cal.App.4th at p. 454.) But “section 273a, subdivision (a) sets forth a standard of conduct that is rigorous. Ordinary negligence will not suffice. Specifically, criminal negligence involves ‘ “a higher degree of negligence than is required to establish negligent default on a mere civil issue. The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life . . . or an indifference to consequences.” ’ [Citation.]” (*People v. Valdez* (2002) 27 Cal.4th 778, 788.)

Cases in which the evidence was sufficient to support convictions for felony child endangerment have involved more extreme home conditions and drug-related activity than present here. (See, e.g., *People v. Odom* (1991) 226 Cal.App.3d 1028; *People v. Toney, supra*, 76 Cal.App.4th at pp. 622-623.) In *Odom*, the defendant stored the chemical precursors of methamphetamine in an unsanitary home in which a seven-year-old and nine-year-old lived. Dog feces was throughout the home, and spoiled food and unwashed dishes were all over the kitchen. (*Odom*, at p. 1033.) Three of 12 firearms in

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be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.”

the house were loaded. Wiring in the home was “jerryrigged” and exposed. (*Id.* at p. 1034.) Similarly, in *People v. Toney*, *supra*, at pages 622 to 623, the defendant was manufacturing methamphetamine in the house, where he kept dangerous and flammable chemicals with a six-year-old child. The presence of the accessible and extremely dangerous chemicals in the living room, dining room, kitchen and garage supported the defendant’s conviction for felony child endangerment.

In contrast, the evidence in *People v. Little* (2004) 115 Cal.App.4th 766, and in *People v. Perez* (2008) 164 Cal.App.4th 1462, was sufficient to sustain convictions for misdemeanor child endangerment. In *Little*, the defendant kept methamphetamine and drug paraphernalia in the house where an infant lived. (*Little*, at p. 770.) The house was filthy with animals, dirt, cobwebs, insects, and cockroaches. The baby’s crib lacked a railing or restraint to prevent her from falling out. The court found, among other things, that the home’s unsanitary condition posed a potential danger to health and that the presence of drugs in the home strengthened that finding. (*Id.* at p. 772.) In *Perez*, heroin was hidden in a hanging plant and in an unlocked drawer of a chess set on an end table in a home where a four-year-old child lived part-time. (164 Cal.App.4th 1462) A syringe containing a liquid was also on a table. The court found that the items were within the child’s plain view and easy access, thereby supporting a misdemeanor child endangerment conviction.

We recognize that *Perez* and *Little* considered whether the evidence was sufficient to support misdemeanor child endangerment convictions, rather than what evidence will not support felony child endangerment convictions. *Perez* and *Little* are nonetheless helpful in determining the conditions that will give rise to the felony versus the misdemeanor, and they help us find that the conditions in Iboa’s home were more like those in *Perez* and *Little* than those in *Odom* and *Toney*. Iboa had a marijuana bong and methamphetamine and ammunition, but there were no drugs or loaded weapons in the house accessible to the children. Although officers found ammunition, they did not find any firearms. Methamphetamine was outside, in a sun visor in a car. This is unlike

*Odom* and *Toney* where highly volatile chemicals were kept in homes with and were accessible to children.

Iboa's home was also unsanitary, filthy, and cold, because there was no running water or heat.<sup>10</sup> The toilet was filled with urine and feces, and old food and mold were in the kitchen and refrigerator, and the children's feet were dirty. But there was no evidence that the children were ill, unfed or otherwise neglected. They had blankets, and the photographic exhibits show them to be clothed. That one child had a runny nose simply does not establish a likelihood of great bodily injury. Nor does the mere presence of bullet holes in the screen door establish that the children were living in conditions likely to cause great bodily injury. Similarly, that a light switch sparked when the officer flipped it does not establish such a likelihood and is very different than the jerryrigged and exposed wiring in a house containing flammable chemicals, as in *Odom*.

These conditions were certainly deplorable, but they were not likely to produce great bodily injury or death. The judgments on counts 8, 9, and 10 for felony child endangerment must therefore be reduced to misdemeanor child endangerment.

**V. Count 12, resisting a police officer.**

Iboa was also convicted of resisting a police officer (Deputy Andrade) under section 148, subdivision (a)(1). He contends that the judgment must be reversed because Deputy Andrade was acting unlawfully when "he ordered Iboa to subject himself to a frisk for weapons." This is not what the deputy ordered, and we therefore reject Iboa's contention.

The elements of resisting arrest, under section 148, subdivision (a)(1), are: (1) the defendant willfully resisted, delayed, or obstructed a peace officer; (2) when the officer was engaged in the performance of his or her duties; and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties. (See also *Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 894.) But "it is no crime in this state to nonviolently resist the unlawful

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<sup>10</sup> Iboa testified he was unable to pay the bills.

action of police officers.’ [Citation.] Thus, ‘[b]efore a person can be convicted of [a violation of section 148, subdivision (a)] there must be proof beyond a reasonable doubt that the officer was acting lawfully at the time the offense against him was committed.’ [Citation.] ‘ “The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in ‘duties,’ for purposes of an offense defined in such terms, if the officer’s conduct is unlawful. . . .” ’ [Citations.] ‘Under California law, an officer is not lawfully performing her duties when she detains an individual without reasonable suspicion or arrests an individual without probable cause .’ [Citation.]” (*Garcia v. Superior Court* (2009) 177 Cal.App.4th 803, 818-819, italics omitted.)

Iboa contends that Deputy Andrade was not acting lawfully because he ordered Iboa to submit himself to a pat-down search for weapons, although the deputy did not have a reasonable suspicion Iboa was armed and dangerous. (*Terry v. Ohio* (1968) 392 U.S. 1, 24, 30; *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1059; *Giovanni B. v. Superior Court* (2007) 152 Cal.App.4th 312, 320; *People v. Garcia* (2006) 145 Cal.App.4th 782, 786; *People v. Dickey* (1994) 21 Cal.App.4th 952, 955-956.) Deputy Andrade explained at trial that he wanted to search Iboa because Iboa displayed hostile behavior by walking toward him using a fast pace and because Iboa wore baggy clothing. These facts, Iboa argues, did not give rise to a reasonable suspicion that he was armed and dangerous.

We need not decide, however, whether these facts would support an order to submit to a patsearch based on a reasonable suspicion that Iboa was armed and dangerous, because the deputy did not order Iboa to submit himself to such a search. Rather, Deputy Andrade testified that he ordered Iboa to put his hands on the hood of the patrol car. Although the deputy gave this order so that he could patsearch Iboa, he did not verbalize his intent to search Iboa. Deputy Andrade’s uncommunicated state of mind and any subjective belief Iboa might have had that the deputy wanted to frisk him for weapons are irrelevant in assessing whether a seizure triggering Fourth Amendment

scrutiny occurred. (*In re Manuel G.*, *supra*, 16 Cal.4th at p. 821.) Therefore, Iboa was *not* ordered to submit himself to a patsearch.<sup>11</sup>

Rather, Iboa was ordered to submit himself to a detention, and he does not argue that Deputy Andrade illegally attempted to detain him. Circumstances short of probable cause to make an arrest may justify a police officer briefly detaining a person for questioning or limited investigation. (*In re Tony C.* (1978) 21 Cal.3d 888, 892.) “[T]o justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation], to suspect the same criminal activity and the same involvement by the person in question. The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith.” (*In re Tony C.*, at p. 893, fn. omitted, citing *Terry v. Ohio*, *supra*, 392 U.S. at p. 22.) “A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.” (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

Deputy Andrade pointed to specific, articulable facts to support his order to Iboa to submit himself to a detention by putting his hands on the patrol car. The deputy had received a complaint about loud music. It is a misdemeanor for a person maliciously and

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<sup>11</sup> Deputy Andrade initially ambiguously testified: “I noticed he was wearing baggy clothing. So due to that and his hostile behavior, I ordered him to put his hands on the hood — [¶] . . . . So I could conduct a search.” Then he clarified that the first thing he said to Iboa was “to put his hands on the hood of my patrol vehicle.”

willfully to disturb another person by loud and unreasonable noise. (§ 415, [¶] (2).)

When the deputy arrived at Iboa's home, loud music was coming from a car, and Iboa was standing alone next to the car. When Iboa approached him in a hostile manner, the deputy ordered Iboa to put his hands on the patrol car. Ignoring the deputy, Iboa said, " 'Fuck you. Stop harassing me,' " and ran to the front yard area. When Deputy Andrade explained why he was there, Iboa turned off the music, and he again refused to walk towards the deputy, saying, " 'Fuck you. I'm not doin' shit.' " Iboa continued to refuse to submit to a detention when backup arrived. These facts show that a crime had occurred and that Iboa was involved in it. The detention order was therefore reasonable under the Fourth Amendment.

Because count 12 concerned Iboa's resisting Deputy Andrade's order to put his hands on the car, and not an order to submit himself to a patsearch, Iboa's related contentions that the trial court failed to instruct the jury on the circumstances when an officer can lawfully conduct a search for weapons and that his trial counsel was ineffective for failing to request such an instruction also fail.

#### **VI. Counts 1 to 5, 11, and 12: the gang allegations.**

As to counts 1 to 5 (attempting by threat to deter an officer from performing his or her duty) and count 11 (possession of methamphetamine for sale), the jury found true gang-enhancement allegations under section 186.22, subdivision (b)(1)(A). As to count 12, resisting an officer, the jury found true a gang-enhancement allegation under section 186.22, subdivision (d). Iboa contends that the true findings must be reversed because (1) there was insufficient evidence to support the "primary activities" element of the allegations; and (2) the evidence was insufficient to establish that Iboa had the specific intent to benefit a gang or to promote, further or assist criminal conduct by gang members. We find that there was insufficient evidence to support the true findings on the gang allegations as to counts 1 to 5 and 12.

(A) *Sufficiency of the evidence on the element of " 'primary activities.' "*

Iboa contends that there was insufficient evidence of an essential element of the gang enhancement; namely, the " 'primary activities' " element. We disagree.

To establish that a group is a criminal street gang within the meaning of section 186.22, subdivision (b), the People must prove that the group “ ‘(1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a “pattern of criminal gang activity” by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called “predicate offenses”) during the statutorily defined period. (§ 186.22, subds. (e) and (f).)’ ” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047, italics omitted; see also *People v. Gardeley* (1996) 14 Cal.4th 605.) “The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group’s ‘chief’ or ‘principal’ occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group’s members. . . . [¶] Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members consistently and repeatedly have committed criminal activity listed in the gang statute.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.) Isolated criminal conduct is not enough. (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 611.) “The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang’s primary activities. [Citations.]” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.)

Iboa argues that the evidence was insufficient here to establish the primary activities element of the enhancement based on Detective Richard Cartmill’s, the gang expert’s, allegedly deficient testimony. Detective Cartmill was asked whether MTC engaged “in any specific kind of criminal activity?” He answered, “Yes,” “Midtown Criminals are engaged in crimes such as assaults, up to and including attempted murder, weapons possession, possession for sales of drugs, vandalism, robbery.”

Iboa compares Detective Cartmill's testimony to the expert's testimony in *In re Alexander L.*, *supra*, 149 Cal.App.4th 605, where the testimony was insufficient to establish the primary activities element. There, the entirety of the expert's testimony as to the primary activities element was: " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' " (*Id.* at p. 611.) This evidence was insufficient: "No specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information. He did not directly testify that criminal activities constituted [the gang's] primary activities. Indeed, on cross-examination, [he] testified that the vast majority of cases . . . he had run across were graffiti related." (*Id.* at pp. 611-612, fn. omitted.) The court added: "Even if we could reasonably infer that [the expert] meant that the primary activities of the gang were the crimes to which he referred, his testimony lacked an adequate foundation. . . . [¶] We cannot know whether the basis of [his] testimony on this point was reliable, because information establishing reliability was never elicited from him at trial. It is impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay. [Citation.] [His] conclusory testimony cannot be considered substantial evidence as to the nature of the gang's primary activities." (*Id.* at p. 612, fns. omitted.)

Unlike the expert in *Alexander L.*, Detective Cartmill's testimony about MTC stemmed primarily from his personal knowledge. Detective Cartmill had been a detective with Operation Safe Streets, a gang unit, for three and one-half years. He had investigated "numerous" crimes involving MTC, including ones where they were victims and suspects. Out of approximately 120 documented members he had contact with 30 to 40 members of the gang.

Based on his intimate knowledge of MTC, when Detective Cartmill testified that MTC "engaged" in crimes such as assaults, up to and including attempted murder, weapons possession, possession for sales of drugs, vandalism, robbery, and

methamphetamine sales, it was reasonable to infer he meant that these were MTC's primary activities. It was, moreover, reasonable to make that inference based on the detective's discussion of the convictions of other MTC members; specifically, Dallas Ray Wright for attempted murder with a gang enhancement, Felipe Flores for robbery committed with other MTC members, Francisco Javier Bravo Perez for robbery, and Oscar Martinez for being a felon in possession of a firearm. Detective Cartmill was the investigating officer on the *Flores* and *Martinez* cases, and he assisted in the *Perez* case. The detective also had personal contacts with Wright, Flores, Perez, and Martinez.

Thus, unlike the deficient expert testimony in *Alexander L.*, the gang expert here testified, based on his personal knowledge, about the consistent and repeated criminal activities of MTC. There was sufficient evidence of the "primary activities" element of the gang enhancements under section 186.22.

(B) *Sufficiency of the evidence to show the crimes were committed for the benefit of the gang.*

Iboa next contends that his due process rights under the Fourteenth Amendment of the federal Constitution were violated because there was insufficient evidence to support the gang-enhancement allegations; specifically, the evidence was insufficient to establish that Iboa committed the crimes for the gang's benefit and with the "specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1)). He raises this issue as to counts 1 to 5, 11, and 12 only.<sup>12</sup>

Section 186.22, subdivision (b)(1), provides for a sentence enhancement when a defendant is convicted of enumerated felonies " ' committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' " ( *People v. Hernandez*, *supra*, 33 Cal.4th at p. 1047; see also *People v. Gardeley*, *supra*, 14 Cal.4th

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<sup>12</sup> Iboa concedes that the evidence was sufficient to establish the gang allegation as to counts 6 and 7, which pertain to Deputies Frias and Valento. When they arrived at Iboa's house during the fire incident, Iboa tried to intimidate them by showing them his gang tattoos and saying he was from MTC.

at p. 617.) The substantial evidence test we articulated above applies to our determination whether there was sufficient evidence to support the jury’s true findings on the gang enhancement. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.) We add that it “is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation.” (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 18-19.) “Generally, an expert may render opinion testimony on the basis of facts given ‘in a hypothetical question that asks the expert to assume their truth.’ [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.] [¶] Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. (Evid. Code, § 801, subd. (b); [citations].) Of course, any material that forms the basis of an expert’s opinion testimony must be reliable. [Citation.] For ‘the law does not accord to the expert’s opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert’s opinion is no better than the facts on which it is based.’ [Citation.]” (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.)

A gang expert’s testimony alone, however, is insufficient to find that an offense was gang related. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.) “ ‘[T]he record must provide some evidentiary support, other than merely the defendant’s record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.’ [Citation.]” (*Ibid.*, italics omitted.) Thus, not all crimes committed by gang members fall within the ambit of section 186.22, subdivision (b). (*People v. Albillar* (2010) 51 Cal.4th 47, 60 [“Not every crime committed by gang members is related to a gang”]; *People v. Ochoa, supra*, 179 Cal.App.4th at pp. 661-663 & fn. 7; *People v. Ramon* (2009) 175 Cal.App.4th 843, 853; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1195.) In *Ochoa*, for example, the defendant, acting alone, carjacked the victim. The

defendant, a gang member, did not reference in any way a gang while committing the crime, although the victim thought that the defendant might be involved in a gang based on the way he looked—he was Mexican with short hair. (*Ochoa*, at p. 653.) The People’s gang expert said that carjacking was a “signature crime” of the defendant’s gang, and that the crime benefitted the gang by providing a means of transportation for gang members and enhancing the gang’s reputation. (*Id.* at pp. 654-656.) *Ochoa* found that the expert had no specific evidentiary support for inferring that the crime benefitted the gang, and his testimony as to how defendant’s crimes benefitted the gang was therefore based solely on speculation, not evidence. (*Id.* at pp. 662-663.)

In *People v. Ramon*, *supra*, 175 Cal.App.4th 843, two gang members stole a car together. The People’s gang expert said that the crime benefitted the crime and was committed with the specific intent to benefit the gang because the defendant and his codefendant were members of the Colonia Bakers criminal street gang, they were stopped in territory claimed by the Colonia Bakers, and they could use the car to commit other crimes. *Ramon* found that there were no facts from which the expert could discern whether the two men were acting on their own behalf the night or on behalf of the gang: “While it is possible the two were acting for the benefit of the gang, a mere possibility is nothing more than speculation.” (*Id.* at p. 851.)

In *re Frank S.*, *supra*, 141 Cal.App.4th at page 1195, the minor was found with a knife, methamphetamine, and a red bandana. He explained that he’d been attacked two days before and had the knife for protection against the Southerners, who thought he supported the northern gangs. A gang expert testified that defendant was an active gang member based on his admission he was a Nortenos affiliate, his possession of a red bandana, and his perceived need for protection. She also stated that the minor’s knife possession benefitted the gang because it provided protection in case of assault. (*Id.* at pp. 1195-1196.) The court found that this was insufficient evidence to support the gang enhancement because it amounted to nothing but “weak inferences and hypotheticals [to] show the minor had a gang-related purpose for the knife. [¶] In the present case, the expert simply informed the judge of her belief of the minor’s intent with possession of

the knife, an issue reserved to the trier of fact. . . . However, unlike in other cases, the prosecution presented no evidence other than the expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue to establish that possession of the weapon was 'committed for the benefit of, at the direction of, or in association with any criminal street gang . . . .' (§ 186.22, subd. (b)(1).) The prosecution did not present any evidence that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense. In fact, the only other evidence was the minor's statement to the arresting officer that he had been jumped two days prior and needed the knife for protection." (*Frank S.*, at p. 1199.)

### **1. Counts 1 to 5, and 12.**

The jury convicted Iboa of counts 1 to 5, attempting by threats to deter the firefighters from performing their duty, and of count 12, resisting Deputy Andrade, in connection with the events of December 28, 2009, when Iboa played loud music in his car. The jury found true, in connection with counts 1 to 5, gang-enhancement allegations under section 186.22, subdivision (b)(1), and, as to count 12, a gang enhancement allegation under subdivision (d),<sup>13</sup> which provides an alternate sentence when the offense has been committed for the benefit of or in association with a criminal street gang.

(*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899.)

The evidence concerning counts 1 to 5 was this: firefighters received a report of a fire in Iboa's neighborhood, and they discovered a fire burning in Iboa's backyard. Iboa was asleep next to the fire. The firefighters and members of the firefighter team testified that Iboa responded aggressively to their presence, ordering them to get the "fuck" off his property and adopting hostile postures. They feared that Iboa meant to assault the fire captain. They did not testify, however, that Iboa threatened them by referencing his

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<sup>13</sup> That subdivision of section 186.22 provides: "(d) Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years, . . ."

gang, including displaying his MTC tattoos. Instead, it was only when the deputies arrived, after the firefighters had vacated Iboa's property, that Iboa displayed his tattoos and trumpeted his gang membership to the deputies.

The evidence concerning count 12 was this: Deputy Andrade responded to a complaint of loud music. He found Iboa standing alone next to car. When the deputy told Iboa to put his hands on the patrol car, Iboa cursed at the deputy and refused to comply with the order. During that encounter, Iboa did not raise his shirt to display his gang tattoos. He did not refer to MTC or otherwise identify himself as a gang member. Deputy Andrade did not testify that Iboa did anything he interpreted as gang-related.

Detective Cartmill, the People's gang expert, testified that Iboa is MTC's leader. He broadly said that a gang leader who challenges law enforcement personnel and behaves aggressively towards them is engaging in gang activity "because one of the main things that gangs are trying to do is to be disruptive to a police investigation." A gang member would reference and display his gang tattoos to law enforcement when they are at his home to intimidate law enforcement and the general public. Such behavior emboldens other gang members.

An expert's testimony that when a gang member commits a crime it generally enhances the gang's overall reputation, thereby "benefitting" it, can constitute evidence sufficient to establish section 186.22, subdivision (b)(1). (See, e.g., *People v. Albillar*, *supra*, 51 Cal.4th at pp. 63-64.) But the expert's opinion still must have an adequate basis in the evidence. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.) In *Albillar*, for example, the victim knew that the defendants were gang members and didn't initially report the crime because she was afraid they would come after her family. (*Albillar*, at p. 53.) A gang member's girlfriend also warned the victim she and her family would be hurt if she reported the crime.

Here, the People's gang expert, Detective Cartmill generally testified that there is animosity toward law enforcement in gang culture. He did not, however, connect his broad and general testimony to the specific circumstances or facts of the case. He did not, for example, testify that a gang member's refusal to put his hands on a patrol car

benefitted the gang. Rather, the detective was asked: “Now, if one is a leader of a gang and they are at their home, which is a gang location, and a situation arose wherein fire department personnel and law enforcement personnel, such as sheriff’s department deputies, came to the location, and that person challenged those personnel and became aggressive towards them and began throwing equipment and making verbal threats to them, would that be consistent with gang activity?” Detective Cartmill answered it would be gang activity, because gangs try to disrupt police investigations. When asked why a gang member would display his gang tattoos or reference his gang to law enforcement when they are at the gang member’s home, he answered it would be to intimidate law enforcement: “ ‘This is our street, this is our area and I’m going to do whatever I want. We’re going to do whatever we want, and the police department can’t do anything about it. I’m not afraid of the police.’ ” The gang member’s behavior “emboldens” other gang members to behave in a similar way.

Detective Cartmill therefore did not specify how Iboa’s act of playing loud music and refusing to comply with Deputy Andrade’s detention order benefitted the gang, other than a general statement that disobeying law enforcement benefits the gang. In fact, the detective agreed that when a gang member resists an officer it can be for his personal benefit rather than for the gang’s benefit. Moreover, the detective explained that whether such behavior benefits the gang “depends on the circumstances surrounding the event, but I don’t—I don’t believe that every single crime a gang member commits is for the benefit of the gang, no, if that’s what you’re asking.” The detective was neither asked to nor did he discuss what “circumstances” underlying Iboa’s encounter with Deputy Andrade would lead him to believe it benefitted the gang. Instead, there was no evidence, for example, that Iboa referenced his gang during his encounter with Deputy Andrade. The deputy did not testify that he was intimidated by Iboa because he knew that Iboa was a member of MTC, unlike the victim in *Albillar*. There was no evidence that Iboa bragged about or told others about this act of resistance to others in the community, again unlike in *Albillar*, where a person associated with the defendant’s gang warned the victim to keep quiet.

Similarly, the expert was not asked and did not testify how the specific circumstances underlying the firefighters' encounter with Iboa showed that the gang benefitted from his obstreperous behavior. The firefighters did not testify that Iboa referenced his gang membership or displayed his gang tattoos in order to deter them from performing their duties. Nor did they testify they knew he was a gang member. There was evidence that when Iboa said they didn't "know who the fuck he was" and he would "show them who he was," that the firefighters understood this to refer to Iboa's gang membership, and Detective Cartmill did not testify that this is something a gang member might say to imply he is a gang member.

Under these circumstances and because the expert did not testify how the specific circumstances of Iboa's conduct towards the firefighters and Deputy Andrade benefitted the gang, the true findings on the gang enhancement allegations in counts 1 to 5 and 12 must be reversed.

## **2. Count 11, possession for sale of methamphetamine.**

The jury also found Iboa guilty of count 11, possession of methamphetamine for sale, and they found true a gang-enhancement allegation under section 186.22, subdivision (b)(1). We find that the evidence was sufficient to establish the gang enhancement with respect to count 11.

In *People v. Ferraez*, *supra*, 112 Cal.App.4th at page 928, the defendant was a Walnut Street gang member, but he told the arresting officer he had permission from Los Compadres gang to sell drugs in their territory, and he was selling the drugs to raise money to buy a car. The People's gang expert testified that the drugs were intended to be sold for the benefit of or in association with the gang. The proceeds would be used to benefit the gang through the purchase of weapons or narcotics or as bail for a fellow gang member. The court held: "Undoubtedly, the expert's testimony alone would not have been sufficient to find the drug offense was gang related. But here it was coupled with other evidence from which the jury could reasonably infer the crime was gang related. Defendant planned to sell the drugs in Las Compadres gang territory. His statements to the arresting officer that he received permission from that gang to sell the drugs at the

swap mall and his earlier admissions to other officers that he was a member of Walnut Street, a gang on friendly terms with Las Compadres, also constitute circumstantial evidence of his intent.” (*Id.* at p. 931.)

Here, officers found three baggies containing methamphetamine in Iboa’s car, as well as a gram scale. This text was received on a cell phone found in the house: “ ‘Hey, can you gt a 20 sac 4 me? I’m leaving wrk nw.’ ” The cell phone had gang members listed as contacts. Detective Cartmill testified that although MTC, Iboa’s gang, commits various crimes and sells drugs, it is known for selling methamphetamine. Although the detective said that whether possession for sale benefits the gang depends on the “totality of the circumstances,” he said, in his experience, it almost always benefits the gang, especially Hispanic gangs. He left open the possibility sales would not benefit the gang, but he couldn’t think of the circumstances where it would not. When asked if a gang member could sell methamphetamine to pay his rent and provide money for his family rather than the gang, Detective Cartmill replied that the gang member would have to keep his sales secret from the gang.

Iboa, however, was not just any low level member of MTC. According to the detective, Iboa was the leader of the gang, and his house was a known gang hangout. The phone numbers and addresses of other gang members were in the house and in a cell phone connected to Iboa. In fact, at the time the house was searched on January 27, Anthony Martinez was at the house. Martinez was a member of another gang, but was known to hang out with MTC. From these facts, the jury could infer that Iboa, as a leader of the gang, did not, and could not, keep his drug activities secret from his fellow gang members. Therefore, the jury could conclude that his possession of methamphetamine for sale benefitted the gang, under section 186.22, subdivision (b)(1).

## **VII. Ineffective assistance of counsel.**

On direct examination of Detective Cartmill, the People’s gang expert, the prosecutor neglected to ask whether methamphetamine sales benefit the gang. Defense counsel, however, elicited the evidence during cross-examination. Iboa contends that because defense counsel elicited evidence to support an element of the gang

enhancement, thereby making the prosecutor's case, his trial counsel was ineffective. We disagree.

“A meritorious claim of constitutionally ineffective assistance must establish both: ‘(1) that counsel’s representation fell below an objective standard of reasonableness; *and* (2) . . . there is a reasonable probability that, but for counsel’s unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.’ ” (*People v. Holt* (1997) 15 Cal.4th 619, 703, italics omitted; see also *Strickland v. Washington*, *supra*, 466 U.S. at p. 687; *People v. Lopez* (2008) 42 Cal.4th 960, 966.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

“Tactical errors are generally not deemed reversible, and counsel’s decisionmaking must be evaluated in the context of the available facts. [Citation.]” (*People v. Bolin*, *supra*, 18 Cal.4th at p. 333.) A reviewing court presumes that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy. “ ‘Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]’ ” (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) The “review of counsel’s performance is to be highly deferential. . . . ‘ . . . Because of the difficulties inherent in making the evaluation [of counsel’s tactical choices], a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense

attorneys would not defend a particular client in the same way. . . .’ [Citation.]” (*People v. Duncan* (1991) 53 Cal.3d 955, 966.)

Here, on direct examination, Detective Cartmill was asked what were MTC’s primary activities. He answered that selling drugs was, among others, one of the gang’s activities. The prosecutor asked if there was any drug in particular the gang sold, and the detective answered, “Methamphetamine.” The prosecutor did not, however, ask the expert to opine on whether Iboa’s possession of methamphetamine was related to or benefitted MTC.

On cross-examination, defense counsel asked the expert if he believed that every time a gang member resists an officer, he does it for the gang’s benefit, and Detective Cartmill answered, “No.” Defense counsel then asked, “And what about possession of methamphetamine for sales? Do you believe that when a gang member commits that crime, that it’s always for the benefit of the gang?”

“A That one is kind of a tricky question. Depending on the totality of the circumstances, but in general, it is for the benefit of the gang.

“Q Okay. And then what circumstances are you referring to? Like, under what circumstances would a gang member commit the crime of possession for sale when it would not be for the benefit of the gang?

“A Like I stated, in general, it is for the benefit of the gang. It would just—it would depend on the total circumstances of the case. [¶] In my experience, it has almost always been for the benefit of the gang in one way or the other, especially with Hispanic gangs. But—I can’t think of circumstances where it would not [be], but I would leave open the possibility that it could not be.

“Q Okay. Well, let me give you a hypothetical. Let’s say you have a gang member. He possesses methamphetamine, and his plan is to sell so he can get the money to pay mortgage or pay off his rent, put food on his table and to pay his own bills, and his plan is not to provide the money for the gang. [¶] In your opinion—does that situation, under that circumstance, would your opinion be that it was for the benefit of the gang?

“A He would have to keep it secret from the rest of [the] gang, that he was selling drugs.

“Q So if he keeps it secret from the gang, then would your opinion be that it was for the benefit of the gang or not for the benefit of the gang?

“A It would be—it’s possible it could be not for the benefit of the gang.

“Q And what about the crime of his possession, just simple possession of drugs, do you believe that’s always for the benefit of the gang?

“A No.”

Placed in context, defense counsel’s questions about methamphetamine was a part of his overall strategy of establishing that gang members can act for their personal benefit rather than for the gang’s. He achieved this strategy by first asking whether Iboa could have resisted the officers or disobeyed them to benefit himself only. Then he asked the question in the context of Iboa’s possession of methamphetamine. Even if defense counsel’s cross-examination elicited evidence to support an element of the gang enhancement, we cannot say that this strategy was so incompetent as to render counsel’s performance outside the wide range of professional conduct. (*People v. Bolin, supra*, 18 Cal.4th at p. 333; *People v. Gamache, supra*, 48 Cal.4th at p. 391.)

### **DISPOSITION**

The judgment is affirmed in part and reversed in part. The judgments on counts 8, 9, and 10 for felony child endangerment are reduced to misdemeanor child endangerment. The true findings on the gang-enhancement allegations in counts 1 through 5 and 12 are reversed. The matter is remanded for resentencing only.

### **CERTIFIED FOR PARTIAL PUBLICATION**

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.